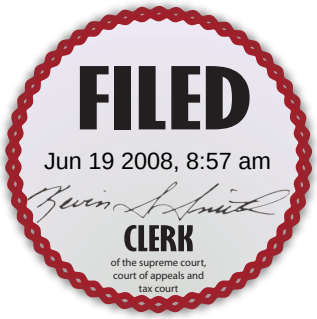

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IN THE
COURT OF APPEALS OF INDIANA

RICKY NELSON VIRES,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 17A04-0712-CR-684
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DEKALB SUPERIOR COURT
The Honorable Monte L. Brown, Judge
Cause No. 17D02-0708-MR-1

June 19, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Following Ricky Nelson Vires' plea of guilty to murder, the trial court sentenced him to sixty-five years in the Indiana Department of Correction. On appeal, he argues that the trial court sentenced him in violation of his rights under *Blakely v. Washington*, 542 U.S. 296 (2004), *reh'g denied*, that his sentence is inappropriate in light of the nature of his offense and his character, and that the trial court erred in failing to provide him with an opportunity to make a statement in allocution. Finding that *Blakely* cannot be violated under Indiana's current advisory sentencing scheme, that his sentence is not inappropriate, and that he has waived his right of allocution, we affirm the judgment of the trial court.

Facts and Procedural History

On May 20, 2007, Vires broke into Novella Tarlton's residence located in Garrett, Indiana. Inside, he encountered the frail ninety-one-year-old Tarlton and shoved her to the ground. Tarlton struck her head while falling to the ground and remained incapacitated on the floor. Vires stole several items from Tarlton's home and then left while Tarlton remained on the floor. Tarlton's injuries included a hairline fracture, and she died twelve days later as a result of the injuries she had sustained.

The State charged Vires with murder,[1] burglary as a Class A felony,[2] theft as a Class D felony,[3] and it also alleged that he was a habitual offender. Vires and the State entered into a plea agreement whereby Vires pled guilty to murder. In exchange, the

[1] Ind. Code § 35-42-1-1.

[2] Ind. Code § 35-43-2-1.

[3] Ind. Code § 35-43-4-2.

State agreed to dismiss the burglary, theft, and habitual offender charges. According to the plea agreement, Vires' sentence was "completely up to the Court with both sides free to argue." Appellant's App. p. 33. The trial court accepted the plea agreement and set the matter for sentencing. At the conclusion of the sentencing hearing, the trial court identified the following aggravators: 1) Vires' extensive criminal history, including at least six felony and fourteen misdemeanor convictions; 2) the victim's age; 3) the fact that the victim was physically frail and infirm; and 4) Vires' failure to render any aid or assistance to the victim. The court identified two mitigators: 1) Vires' difficult, chaotic, and dysfunctional childhood and 2) Vires pled guilty. Finding that the aggravators far outweighed the mitigators, the trial court sentenced Vires to an above-advisory sentence of sixty-five years. Vires now appeals.

Discussion and Decision

Vires raises the following three issues on appeal: 1) the trial court sentenced him in violation of *Blakely*; 2) his sentence is inappropriate in light of the nature of his offense and his character; and 3) the trial court erred by failing to provide him with an opportunity to make a statement in allocution.

I. *Blakely*

Vires first contends that he was sentenced in violation of the United States Supreme Court's opinion in *Blakely* because the trial court enhanced his sentence based on aggravating factors that were not prior convictions, not reflected in the jury's verdict, and not admitted by Vires. We disagree.

On April 25, 2005, the legislature amended Indiana's felony sentencing statutes, which now provide that the person convicted may be sentenced to any term within a range of years. The trial court is not required to find any aggravating factors when imposing sentence within the applicable range. *See* Ind. Code §§ 35-50-2-3 to –7. Under the new advisory sentencing scheme, it cannot be said that a trial court violated *Blakely*. *Anglemyer v. State*, 868 N.E.2d 482, 489 (Ind. 2007), *clarified on reh'g*, 875 N.E.2d 218 (Ind. 2007).

"[T]he sentencing statute in effect at the time a crime is committed governs the sentence for that crime." *Gutermuth v. State*, 868 N.E.2d 427, 431 n.4 (Ind. 2007). Because Vires committed the charged offense on May 20, 2007, we apply the current advisory sentencing scheme. We therefore agree with the State that Vires did not suffer a *Blakely* violation.

II. Inappropriate Sentence

Next, Vires contends that his sixty-five year sentence is inappropriate. Although a trial court may have acted within its lawful discretion in imposing a sentence, Article VII, Sections 4 and 6 of the Indiana Constitution authorize independent appellate review and revision of sentences through Indiana Appellate Rule 7(B), which provides that a court "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, the Court finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." *Reid v. State*, 876 N.E.2d 1114, 1116 (Ind. 2007) (citing *Anglemyer*, 868 N.E.2d at 491). The burden is on the defendant to persuade

us that his sentence is inappropriate. *Id.* (citing *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006)).

As for the nature of the offense, Vires broke into the home of a ninety-one-year-old frail and infirm woman and shoved her to the ground. After being shoved, Tarlton struck her head while falling to the floor, suffered a hairline fracture, and died twelve days later as a result of the injuries caused by Vires. Vires did nothing to aid Tarlton while she lay incapacitated on the floor while he burglarized her home. Nothing about the nature of this leads us to conclude that Vires' sentence is inappropriate.

As for Vires' character, it, too, does not warrant a reduced sentence. Over the course of his life, Vires has amassed a significant criminal history consisting of at least six felony convictions, including two aggravated burglaries, and fourteen misdemeanor convictions, including domestic violence, battery, and resisting law enforcement, and he has failed at both parole and probation. The trial court correctly noted that Vires is a "life long criminal." Tr. p. 80. Given the nature of this offense and his character, Vires has failed to persuade us that his sixty-five year sentence is inappropriate.

III. Right to Allocution

Finally, Vires asserts that the trial court erred by failing to inform him of his right to make a statement in allocution and by failing to give him the opportunity to exercise that right. The "right of allocution" is rooted in common law and is defined as the opportunity at sentencing for criminal defendants to offer statements on their own behalf before the trial judge pronounces sentence. *Biddinger v. State*, 868 N.E.2d 407, 410 (Ind. 2007). This common law right of allocution was first codified in Indiana in 1905 and has

since been recodified or amended several times. *Id*. at 410-11. In its present form, the statute provides:

> When the defendant appears for sentencing, the court shall inform the defendant of the verdict of the jury or the finding of the court. The court shall afford counsel for the defendant an opportunity to speak on behalf of the defendant. The defendant may also make a statement personally in the defendant's own behalf and, before pronouncing sentence, the court shall ask the defendant whether the defendant wishes to make such a statement. Sentence shall then be pronounced, unless a sufficient cause is alleged or appears to the court for delay in sentencing.

Ind. Code § 35-38-1-5(a).

Regarding the right of allocution in guilty plea scenarios, our Supreme Court recently held that

> [b]ecause a guilty plea is not based on "the verdict of the jury or the finding of the court" the trial judge is not required to ask the defendant whether the defendant wants to make a statement as provided by Indiana Code § 35-38-1-5. It is in that sense that there is no statutory right of allocution upon a plea of guilty. But when a defendant specifically makes a request of the court for the opportunity to give a statement, as the defendant did in [*Biddinger*], then the request should be granted.

Biddinger, 868 N.E.2d at 412 (citing *Vicory v. State*, 802 N.E.2d 426, 429 (Ind. 2004)). In *Biddinger*, our Supreme Court determined that the trial court erred by failing to allow the defendant to make a statement. *Id*. Nonetheless, the court concluded that the error was harmless because Biddinger failed to "establish how the excluded portion of his statement would have made a difference in the sentence the trial court imposed." *Id*. at 413.

Applying *Biddinger* to this case, we conclude that the court was not statutorily required to ask Vires, who had pled guilty, whether he wished to make a statement.

Moreover, neither Vires nor his counsel specifically requested the opportunity to give a statement. Nevertheless, Vires maintains that

> [t]he trial court's failure to provide such an opportunity was particularly harmful in this case where the trial court specifically questioned whether Vires was accepting responsibility for his conduct. Allowing Vires to personally speak would have given him the opportunity to fully take responsibility for his actions and provide a basis for the trial court to place more weight on that mitigating factor.

Appellant's Br. p. 26 (citations omitted). We disagree. The trial court did not refuse Vires the opportunity to speak in allocution at his sentencing hearing. Vires neither asked to speak nor objected to a lack of opportunity to speak. Accordingly, we find no error.

Affirmed.

MAY, J., and MATHIAS, J., concur.